GREAT PONDS

THE increasing needs of the public for pure water-supply have recently called attention to the rights of the State in the Great Ponds of Massachusetts, which were consecrated by far-reaching provision to public uses as long ago as the ordinance of 1641–7, by a devotion sufficiently broad, says Mr. Justice Hoar, "to include all public uses as they arise." The liberality of the State has, in times past, allowed the fisheries of certain of these ponds, under twenty acres in extent, to be controlled by abutters.[1] It has also, by the terms of sundry water-works acts, allowed mill-owners on their outlet streams to be compensated by towns taking such great pond water.[2] Such policy has, with the march of events, ended, and it appears to be now the policy of the Commonwealth to assert fully its ancient rights in great ponds, and to permit its municipalities to take water therefrom without paying mill-owners below, any more than the State itself would be legally bound to pay, — that is, nothing. This form of expression in the recent water-works acts of Fall River (1886), New Bedford, Malden, Ayer (1887), Ashburnham, Maynard, etc. (1888), was adopted in order not to preclude any right that the mill-owners might think sustainable in the courts of law. The case of the mill-owners of Fall River has reached a decision.[3] A majority of the court decree against them on comprehensive grounds, derived from the operation of the above ordinance in this State, its purposes and uses as long construed, its displacement of antecedent common-law views, if such views ever had validity. The minority of the court dissent, and hold that the mill-owners have legal right that the great pond waters shall enter into the outlet stream and come to their mills, and that the Commonwealth cannot enact otherwise without compensation. It is not proposed in this article to examine the views of a majority of the court. Their position did not call for any exhaustive inquiry as to what a watercourse is. To the dissenting opinion, however, it is abso-

[1] P. S. chap. 91, sects. 10 and 23.

[2] Watuppa Res. Co. *v.* Fall River, 134 Mass. 267.

[3] 18 N. E. Rep. 465 (Mass.). For summary of the case see 2 Harv. L. Rev. 291.

lutely essential to establish the proposition that a great pond of three thousand acres, or a lake, is a brook, a stream, a river. Until this point is established in a miller's favor, he has no standing and no right to discuss the measure of the public title under the ordinance of 1641–7. Is it so established in the dissenting opinion? Does the dissenting opinion treat fully this important question as a question of reason and historic law, to say nothing of its possible modifications in Massachusetts?

The opinion cites many authorities to maintain that a right to a stream is sacred, and that not even the State can divert without compensation. No one doubts this. It proceeds to say, in the clean-cut English of Mr. Justice Knowlton, that the "State has no better right to divert water from the river by drawing it out of the pond, than by drawing it from the river, *for the river and pond are parts of a natural water-way, through which the water passes from its sources to the sea. Together they constitute a single system and natural feature of the country, the preservation of whose form and identity is essential to the enjoyment of all the property bordering upon their waters.* As against riparian owners below, every reason which forbids the diversion of water from a swiftly flowing stream is equally strong to prevent diversion where the water moves more slowly on its way to its outlet. And this has been distinctly adjudicated in cases of high authority, and, so far as we are aware, without contradiction;" and, after citing several cases,[1] treats our topic no further, but proceeds to grapple with the ordinance of 1641.

We are not quite convinced that the plaintiff is yet entitled to such grapple; that he has yet made out his *prima facie* title at common law. The reasoning is hardly so full as such a momentous extension of title might call for. The italicized statement is, of course, intended as a legal proposition, for the agreed facts do not contain it, and do contain the fact that in the pond "there is no perceptible current whatever."

The water lawyers hoped for a full discussion here upon the topic whether and when a lake is a watercourse. They have seen

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[1] Gardner *v.* Newburgh, 2 Johns. 162; Smith *v.* Rochester, 92 N. Y. 463; Clinton *v.* Myers, 46 N. Y. 511; Hebron Gravel Co. *v.* Harvey, 90 Ind. 192; Dudden *v.* Guardians of the Poor, 1 H. & N. 627; Howe *v.* Norman, 13 R. I. 488; Shaefer *v.* Marthaler, 34 Minn. 487; West *v.* Taylor, Ore., April 4, 1887, 13 P. R. 665; Cummings *v.* Barrett, 10 Cush. 186.

many books entitled Law of Watercourses, Law of Running Waters, less about the law of still waters or the law of lakes, and almost nothing about the intermediate case, where there is a lake with one brook running out of it and another running into it. They are hardly satisfied when told that a riparian's rights are to configuration of the soil from mountain-top to the sea. They do not find any such fearfully broad doctrine in the books. They know that infinite changes in territory between the outlet riparian and the mountain-top may be legally made, to his very great prejudice; that forests may be felled on the upland slopes so that the water that comes to his mill may come in disastrous floods. They know that extensive marshes and swamps above him may be legally drained by their owners, so that his mill-wheel stops; that the surface water of thousands of acres may be legally diverted, so that he can never use its propelling force. They know that the passage of rains and melting snows over the surface for twenty years gives no title to its continuance.[1] They know that an intercepting sink, currentless, intercepts the miller's title, though a watercourse may exist both above and below the sink. They know that subterranean percolations, an enormous source of every river's supply, can be legally diverted. They were told by the court[2] that, even being a "natural water-way" is not enough to make it a watercourse, unless there is a current. They do not know that the "form and identity of the natural features of the country" is enough to give the miller any title to surface water, subterranean water, marsh water, swamp water, though all of them are important sources of supply to every "natural water-way."

In fact, they do not find in the books that he has any right at all extending from his mill to the mountain-top, unless there is a regular watercourse all the way, unbroken, with definite channel and a perceptible current, with a bed and sides or banks. They ask to know why the courts have been so careful to inquire whether the situation amounted in fact to a watercourse, *e.g.*, why Lewis, C. J.,[3] says, "To entitle it to the consideration of the law, it is certainly necessary that it should be a watercourse in the proper sense of the term;" and they have come to believe that the miller's right only extended as far as the water was in the

[1] 10 Gray, 28.

[2] Godfrey *v.* Macomber, 108 Mass. 221.

[3] Wheatley *v.* Baugh, 25 Penn. St. 528; also Bigelow, C. J., 2 Allen, 589.

shape of a watercourse; that his title was under the law of "running waters" only; and that a plaintiff miller by no means makes out a case against a diverter by merely putting in proof configuration from sea to summit, unless other facts show it constitutes an unbroken watercourse from the point of diversion to the mill.

The dissenting opinion does not restate the facts in the Fall River case, and we therefore refer to them. The Watuppa Lake comprised three thousand acres; its surplus water tumbled down a hill on which stood the mills. They were established under the mill act of the State; but that is not of importance, for the riparian's title exists, if at all, without any mill act, and the only question is as to its limit up stream. The city water was taken by a pump two or three miles distant from the outlet.

The agreed facts find that there was "no perceptible current whatever." Did, therefore, any watercourse, in point of law, continue clear through the lake, several miles long, or did the watercourse in which the plaintiff had a right commence at the point where the water started into motion at the outlet? Was the water a single legal watercourse to the mountain-top, or was it intercepted, broken up into several, by objects that were not watercourses?

In Massachusetts this inquiry, in this precise form of a common-law question and irrespective of the ordinance, has not been adjudged in favor of the miller. Cummings *v.* Barrett [1] is cited on both sides. The uncertainty therein expressed by Judge Shaw in 1852 was a noteworthy circumstance, as in seeking for an analogy to a great pond, he says, "Perhaps a running stream may form one, and apparently a strong one." But an analogy is not *idem.* He also says, "Water taken from the body of a pond never could be water flowing from the pond;" and he calls the claim a "new claim,"— a "new and unsettled right."

Tudor *v.* Cambridge Water Works [2] gives us no help. An imprudent demurrer to a bill stuffed with strong averments was overruled, of course. Fay *v.* Salem Aqueduct Co. [3] is also cited on both sides. We will venture a remark on this case, premising that all now assent to the doctrine that an abutter's right in running water is no mere easement, but a part and condition of his realty. If Spring Pond was part of a watercourse, Mr. Fay had

[1] 10 Cush. 186. [2] 1 Allen, 164. [3] 111 Mass. 27.

such right, and, in fact, all of this alleged "watercourse" (Spring Pond) that was above low-water mark was on his land. It would be a valuable part and condition of his realty. It was taken away from him, and to his complaint Judge Gray replies thus: "The pond and water belonged not to him, but to the public;" "no part of the petitioner's estate has been actually taken." This suffices for the present discussion. The opinion could not have been written if the court believed Mr. Fay to be a riparian upon a watercourse. If a watercourse, Mr. Fay's abutting right would be also valuable whether he owned the soil under any of the water or not.[1]

It seems, also, that the opinion in Hittenger *v.* Eames[2] could never have been written if the shore owner had the rights of a watercourse riparian. Would the court have said, "The owners of the shore (of the lake) have no peculiar rights in the waters except by grant of the Legislature"? So, too, of Gage *v.* Steinkrauss.[3] "As owner of the shore he had no title whatever in the water or ice." What singular language to use in respect of an owner on a watercourse! Stealing water frozen would be no more virtuous than stealing it unfrozen. But it was not a watercourse; it was a great pond.

In the foregoing we discern indications of Massachusetts judicial opinion. The long-continued title in great ponds (now of priceless value) will, irrespective of its own dominant authority, doubtless influence in this State the question, if it shall ever need to be met by the whole court, as to the point of origin as a watercourse. We have long since settled the title in the land under great ponds by a rule unlike that of certain Western States. It seems likely that the law of running waters will not be extended to waters that do not run, especially when the public peril in so doing is now obvious. Such extension in Massachusetts would be a hypothecation forever of these glorious free public reservoirs, to pay claims of mill-sites and bank-owners. There will be ambiguous cases, of course. A river may widen out to the semblance of a pond. The best text-writer on these topics, Mr. Gould (1883), sums up thus: "Fresh-water lakes are distinguishable from rivers chiefly by the fact that they have no current.

[1] Gould, sec. 148; Lyon *v.* Fishmongers Co., 1 App. Cases, 662.

[2] 121 Mass. 546.

[3] 131 Mass. 222.

The fact that there is a current from a higher to a lower level does not make that a river which would otherwise be a lake; nor does a lake lose its distinctive character because there is a current in it for a certain distance, tending toward a river which forms its outlet. On the other hand, the fact that a river broadens into a pond-like sheet, with a current, does not deprive it of its character as a river."

The New Hampshire court indicates a similar view.[1] Below Lake Winnepiseogee is an outlet river, with large spaces called "bays" along the river. The question arose whether one of these was a river or a lake. The court says, "It may be none the less river, if it is called 'bay'; on the other hand, it may be so connected with the river as to form a body of standing water, and not be considered a part of a river. These bodies of water may be lakes of themselves, in which case there are two or more rivers. Or they may be in some instances mere enlargements of a river. In this case there is a current which would indicate that at that place (the bridge) is a river." The case was sent to a jury to ascertain whether, at that place, it is a river or not. The judge instructed that it depended on the fact whether there was a regular and steady and perceptible current or not. The full court used this expression, "A sheet of water in which there is a current from its head towards its outlet is not, *therefore*, a river."

The cases cited from other States in the dissenting opinion do not convince us. They will, of course, be read attentively. Smith *v.* Rochester[2] does not say a lake is a watercourse. There was no finding whether there was a current or not. It was held, under a water-works act, that said act recognized and provided for damages to outlet millers. This is exactly the case of 134 Mass. 267, and nothing more. In passing, the court says, "The doctrine of riparian ownership is inapplicable to the vast fresh-water lakes or inland streams of this country, or the streams forming boundary lines of States." But the court does not say how much vastness, nor whether a "great pond" is vast, nor why a State line thus limits this "condition of realty." Clinton *v.* Meyers[2] was an issue between two millers. Nobody raised our point. The court only decided questions as to unreasonable use of dam, etc. Howe *v.* Norman[2] decides that defendant shall not divert a spring which

[1] State *v.* Gilmanton, 9 N. H. 461; s. c. 14 N. H. 471.

[2] *Supra*, p. 317, note 1.

flows in an indefinite channel over his land into plaintiff's, and cites the Dudden case. It has been held several times that a definite subterranean watercourse is none the less a watercourse for being subterranean. The spring was a portion of such a watercourse. This case tells us nothing about the law of lakes. Gardner *v.* Newburgh[1] is similar. West *v.* Taylor[1] decides nothing as to Lake Cullaby itself, but only a question between two owners on the outlet, which was an ambiguous sort of thing, apparently with a current, but resembling a swale or surface depression about as much as a brook. One diked it off his land on to the plaintiff. The court held, this outlet on its facts amounted to a watercourse. Shaefer *v.* Marthaler[1] was an issue between two shore owners on a pond of four and one-half acres (probably private property). The court held that one owner must not drain the pond, thinking it not mere surface water, but a valuable reservoir. They do not decide it to be a watercourse. No outlet miller or riparian on the stream was a party, and we do not know who owned the bottom. This case is an interesting one, as it appears to declare that in Minnesota the abutters on, or owners of, a beautiful pond have some community of interest in it, but does not reach an assertion that the land-holders below have interest too, nor that the community among stream riparians is the same community as that among pond riparians. The point adjudicated in this case was differently decided in a Massachusetts great pond case.[2] Hebron Gravel Road Co. *v.* Harvey[1] is also interesting as approaching our topic, but not exactly reaching it. Plaintiff complained of flooding by a dam across a "running stream of water called Lake Headley." The court queries whether the "body of water called Lake Headley was a running stream, or was it merely surface water? The complaint says it was a large stream of running water, and does not show that it was mere surface water." It is spoken of repeatedly as the "so-called Lake Headley." Instruction to jury was, "if you find its waters at north-east end percolated through gravel so as to reduce its waters with unusual rapidity, so great as to create a drawing or movement of the waters to that end, *though imperceptible to ordinary observation*, then it was a watercourse." There was evidence that the water passed through the porous gravel with such rapidity as to create a continuous current from south-

[1] *Supra*, p. 317, note 1.

[2] Fay *v.* Salem, 111 Mass. 27.

west to north-east, and that this had always been so. The jury were told not to find for the plaintiff unless they should find from the evidence that the so-called Lake Headley was not mere surface water, but was and had been a permanent watercourse, such as the court described. The italicized words above favor the miller's view more than any case we have seen ; but it is still apparent that this "so-called Lake Headley" was an ambiguous thing, the characteristics of which we cannot very well learn from the report. It resembled a brook in some respects, and a lake in some. Such doubtful cases must go to a jury, and it did so. But why need it go to a jury at all, if the view of the dissenting opinion in the Fall River case is sound? It goes to a jury because some outflowing lakes are not in fact *watercourses*. That is, the lake is not a watercourse unless upon its character the law of running water can in fact reach it, and it is not a watercourse merely because it is a link in a "water-way" from summit to sea. The word "link" had better be dropped. It may be a severance, and not a link. In New York the bottom of the Mohawk belongs to the State (like that of a great pond in Massachusetts). The State diverted the water, and the court held, "Riparian mill-owners are not entitled to any damage against the State."[1] In Broadbent *v.* Ramsbottom[2] defendant owned a pond of six acres, the overflow of which went into the plaintiff's brook. The court held, "Plaintiff's right cannot extend further than the flow into the brook itself and to the water flowing in some defined natural channel. Before it reaches such defined channel the land-owner has the right to appropriate it. He has a right to drain his pond and his marsh also."

In Chasemore *v.* Richards,[3] Wightman, J.: "Such a right as claimed would deprive a man of the right of draining his land" (or the State of Massachusetts from draining or filling its great ponds). Chelmsford, J., in Roustrom *v.* Taylor,[4] says, "The use which any owner in a running stream may claim is only of the water which *has* entered into and become a part of the stream."

Thus far the books ; and it really seems that in Massachusetts the alleged title in the outlet riparian has never been established, nor has it in England or elsewhere. Of course those cases where towns have paid damages to millers under the conditions of water-

[1] 33 N Y. 465.
[2] 11 Exch. 602.
[3] 7 H. of L. 359.
[4] 11 Exch. 367.

works acts are without use in this discussion. Those towns took *per formam doni*.[1]

The law of running water originated in natural right. If A owns a section of a brook he owns it as such, and ought not to dam it back upon its up-stream neighbor; nor ought the up-stream neighbor to withhold it from A. Such duty and right grow out of motion, continued, definite, perceptible movement of that part of the realty we call water. When a drop of water enters a definite watercourse, it is practically, and fairly, and legally regarded as destined to reach A, with its benefits of user, power, etc., and the law of running waters arose. No such course of thought, no such desired legal adjustment of correlating rights, call for such law in respect of waters that do not move. Till the water-drop has reached the natural guide which is to compel it to the plaintiff's wheel, it is free. He has no title in it, whether it be in the air, in a bog, or surface water on a hill-side. The great Dismal Swamp is an enormous sponge on top of the ground. The surplus of rain-drops which the sponge cannot hold, seep and percolate about till eventually enough of them coöperate to form a channel, and then a watercourse begins.

Many legal rights have their limitations in practical rules for action, and the limit of the right of a riparian on a watercourse is not to the mountain-top, whence in theory the drop starts, but at the point where it becomes practically and substantially condemned, and in channel guidance to the miller's wheel. On the surface slopes of some mighty glen, swale, or mountain-side, the drop has not yet reached or become a part of the miller's title, for it is not yet a watercourse drop,—it is a surface-drop which any land-owner may exhaust or divert at will. When the drop is stagnant in some marsh or swamp which leaks out into a brook, it still has not reached the miller's title, for the marsh-owner can drain his marsh or swamp elsewhere.

Thus far we find settled law, and show how serious are the limitations of this configuration title alleged to extend from mill to mountain. There is another intervenor as to the character and effect of which it is not ours to decide. That is the still-water lake. Shall the rule of practical sense, above set forth, govern this case, and say it is not a watercourse, or shall the miller at Niagara be

[1] Watuppa Co. *v.* Fall River, 134 Mass. 267; Smith *v.* Rochester.

legally entitled to the waters of Michigan and Superior, and to his suit if the Illinois water-way is opened? Will not the court say to the miller, "We have long told you that you have no right whatever in surface water. Nor do you have any in still water. Running waters originated your title, and to them it is limited too."

There are in the Mississippi valley long lagoons, bayous, full of water but closed at each end, miles in length and but a few rods in width, most frequently curved like a crescent. Their ends have closed, but the swamp waters keep them full. No one would claim that these are watercourses, or anything but extremely elongated ponds, with uses and values very different from those of unnavigable brooks. In Massachusetts[1] there would be no community of interest in the shore-owners. In Minnesota there might be, but even there not the identical community of interest that obtains among riparians on a stream; and, if we may use such a word, it could not be right to force the lake partners into the partnership of stream partners.

That is to say, given a large lake, it will not be pretended that in Massachusetts its hundreds of shore titles are in any sense loose or otherwise tenancies in common of any reservoir. There is no occasion for a body of law to arise to adjust their correlating rights.

They do not interdepend, certainly not as riparians upon running water do. Therefore no similar body of law has come into existence to regulate lakes. Let us suppose, too, that the large lake has an outlet over which its surplus waters pour, when there are any, into a watercourse. But the lake itself below the bed-rock of the outlet remains forever changeless, perhaps a hundred feet deep. It is not going very far to claim that not only the surplus surface water, but the permanent water, too, should be in law condemned to aid in maintaining the mill-flow, and be regarded as a river? Blackstone says water is a species of land. Is it not logical to say that the changeless bottom water of the lake is legally identical with a mere marsh in which no brook-owner has any right, and that the surplus water from rains, etc., is mere surface water, like surface water anywhere else, on a field or hill-slope, in which, also, no brook-owner has any title till it forms itself into a watercourse with its banks and current; that is to say, at the point where it

[1] 111 Mass. 27.

leaves the lake? Is not that the point of demarcation of title? Below that point its destination to the miller has, in point of fact, become assured, sufficiently for the law to treat it as assured, and subject it to the law of running waters. Blackstone thinks water, like a bird, to be of a wild, untamable nature, and that any title to it involves a kind of possession. Perhaps the law has gone far enough when it says that if it gets into my spout or my watercourse it is mine. Suppose a lake has several outlets, of which watercourse would the lake form a part? Suppose in summer the deep lake delivers no water into any outlet, shall this Commonwealth, with all its great title of 1641, have no right to use the motionless waters? If the court of this State ever has to meet the exact question, whether to adopt as a part of the common law of running waters this broad claim of the millers, it may well hesitate, and say such adoption would be strange and novel, and would not consist in this State with the ancient freedom of great ponds from all private title.

It is conceivable that a brook may originate now or in the future. Probably most lakes antedate their outlets. Select a great pond that has no outlet. The State can drain it, and no abutter can complain;[1] nor can any stream riparian, for there is no stream. So the ownership is entire and indisputable in the State. Suppose, by topographical changes, extensive gradings for ornamental grounds, parks, streets, railway-cuts, and embankments, multiplication of street-gutters, alteration in forest-tracks, etc., etc., the watershed increases and the pond rises. Of course the State's title in the increased water is entire. Let it rise still more till it threatens to overflow its lowest bank. Doubtless the State, by dike or drain, could prevent such overflow. But having no present occasion for the water it does nothing, the water overflows, and in a month or two, wearing for itself a channel and banks, runs a beautiful and useful brook through the lower farms to the sea, to the delight and profit of its riparians. Doubtless *inter sese* the rights of these riparians begin. A few months elapse, and the city of Boston needs relief. Is the State now disabled? Can it no longer dike, no longer pump water for this half-million of its people without paying for it? Have the rights of the riparian A, below, attached not only to the overflow permitted by the

[1] Fay *v.* Salem, 111 Mass. 27.

State, but have they followed up, into, over, and through the lake itself, so as to possess not only the surplus overflow, but so that A may insist that the vast original pond shall remain a sort of elevated table, undrained and unpumped forever, to the end that there shall be an overflow? Which is the fair thing? If the pond were a water-soaked swamp, there would be no doubt about it in law. The swamp-owner could stop the overflow at will, by drains or dikes. Ought the absence of tussocks, flags, weeds, bushes, vegetable-mould, etc., etc., to make any difference in title? In point of natural right, has really A acquired anything except those drops which have escaped *de facto* from the custody of the swamp or pond owner, and submitted themselves to the custody of the channel-banks of the brook? When the State has, for the period referred to, permitted the overflow of some water, has it waived any of its ancient rights except to the exact quantum of water which it has permitted to escape from its custody into another's? So long as the conductor-pipes of the State House deliver water into an adjacent owner's premises, which he stores in his cistern, the State has lost it; but shall it not, even after a hundred years, divert those conductors into its own State-House cistern for thirsty office-holders? The law is clear in case of an overflow from any artificial reservoir. But it will be said that the great pond supposed is a natural reservoir. What of that? The State's title to the natural reservoir, prior to any overflow, is at least as good as that of the owner of the artificial one. The cultivator of useful fishes in the pond may be satisfied for a time with an imperfect enclosure, through which some of his fishes escape from his title into A's brook and private fishery; but shall not the cultivator mend and tighten his enclosure when he sees fit? The legal possessor of a furious whale may decide to let him go, and quite a body of law has grown up to settle the rights *inter sese* of subsequent pursuers and captors, but no wise in derogation of said possessor while he chooses to retain possession by his line and iron. Shall he who picks crumbs that fall from the rich man's table be entitled to insist upon the continuance of the superfluity and the table too? After all, is not the still pond more legally analogous to the watery swamp than to the running river?

It was the community interest in the brook that built up water-course law. A peculiar article was owned by many. Some texts used to call such owners tenants in common. Though the fugi-

tive water-drops passed on and away, the form and value and power of a brook abided. The interrelating rights to it called for some fair principle to be established as the law of the case. How far shall such principle operate and have scope? Probably no farther than the quasi-community of interest in the owners to adjust their respective mill-powers, elevation of dams, and prevent back-water, withholding water, etc., etc. The far-above owner upon the lake shore is not similarly interested in such possible disputes. His disputes with his neighbors on the lake are not the same. There would seem to be no reason why he and his lake neighbors should be included in the body of law necessary for the running-water millers, unless it is a legal reason that millers would make more money if their titles were extended over other people's ponds. So they would, if they could likewise control other people's swamps and hill-sides.

When a question arises in this State whether some principle of the English common law has been adopted here or is adoptable now, an inquiry is made of a somewhat peculiar nature, not by a professor, but by a department of the State government, which does not always exclude reasons of politic wisdom from its determination. First, was the asserted principle known and established prior to our separation from English authority? Second, does it fit appropriately into our system and ways? If it was not established at the time of the Revolution there is not much to adopt, for the views of English courts since that time, even upon historico-legal questions, do not bind us. Nor are the views of judges of other States of very great importance here, for their localities may have their own reasons for "adopting" or rejecting the alleged principle. In the different American tribunals all sorts of reasons,— physical, historic, and otherwise,— usages, unreported practice in inferior courts, professional and popular understandings, etc., etc., bear upon this question of "adoption." The decision might be one way in Pennsylvania and New York, and the other way in Indiana or Oregon. It might specially differ in Massachusetts, where, in respect of great ponds, for two and a half centuries, rules and policies of a special nature have obtained, not known in the Western States.

Our court may well say, "We do not find in the English books prior to the Revolution any hint of the extension of a miller's title in running waters to still waters. We find the courts of New

York and Pennsylvania denying it in respect of great rivers. We cannot see that the knowledge or belief in any such principle influenced acts or transactions here in the colonial and provincial periods. On the contrary, the existence of the ordinance for nearly a century and a half before the Revolution may have excluded from the popular and professional mind, and from the minds of vendors and purchasers, any thought that a miller had title to the waters of a Massachusetts great pond. The very absence to this day, and through one hundred and forty-six volumes of reports, of a decision giving a milller such a comprehensive title is in itself significant. The *dicta* in Potter *v.* Howe[1] and Trowbridge *v.* Brookline[2] are also significant. We are impressed by the declarations of our own court that "there is no adjudged case in which any right in the great ponds adverse to the public has ever been recognized," "that the devotion of the great ponds to the public use is sufficiently broad to include new public uses as they arise," "that they are not to be appropriated to the use of any particular person," "that the usage and practice under the ordinance seems to have been consistent with the understanding that great ponds were public property" (West Roxbury *v.* Stoddard). We find in 1866, chap. 187, the Legislature authorized towns to divert the waters of great ponds, and this without any provision for compensation to affected millers. Cole *v.* Eastman[3] was decided by a unanimous court, and was right, and now the enjoyment by the public of free public waters in great ponds must be placed in the same grade and in as lofty a rank as herrings. It cannot be said that the Commonwealth ranks alewives so superior to common-law title, but remands the mighty subject of the purity and comfort of its people to a lower plane and to a less parental care. There must be no discrepancy as to these public rights which stand on the same legal footing. Never mind the State's past liberality to the millers. Wood-choppers and tolerated squatters long cut into the national forests; but shall not Congress, when it pleases, exert its title to give free homesteads to its citizens without paying toll? So Mr. Cole, of Eastham, owned at common law his fishery, till in the fulness of time it became wise that the supreme title of the Commonwealth should be exerted in favor of the public. In fact,

[1] 141 Mass. 359. [2] 144 Mass. 143. [3] 133 Mass. 65.

this great ordinance was a measure of almost divine forecast, and cannot be ignored in determining the adaptability of an alleged, but obscure, perhaps non-existent, English principle.

We find State statutes authorizing its own commissioners and lessees to cultivate useful fishes in great ponds, with power to occupy portions with enclosures without compensation to millers. Such enclosures may presumably be solid dikes, to retain spawn, to keep out hostile fish, or retain the water itself as against natural depletion by the miller's brook. This may be very inconsistent with a miller's right to hold or let off water; very inconsistent with the stream riparian's right, for it will not do to have the Commonwealth's useful fishes dying on bare mud.

The difficulty of establishing the riparian's title to the extent claimed will be shown by its inconsistency in this State, not only with the public ownership of great pond waters, but in this matter of the riparian's fishery. English citations do not avail here. He holds under Massachusetts, and she allows him no fishery title except subject to the public, not even in his own brook where his common-law title would be clear. The same great ordinance of 1641 regulated both water and fishery, and that it dominates the otherwise private fishery title has, in this State, been settled.[1] The court will not have two opposite doctrines under the same ordinance. Mr. Cole owned his fishery at common law. His title to it was clearer than a miller's claim to a great pond. The State exerted its ancient rights under the ordinance and gave the fishery to the town of Eastham, by an act which in terms provided for the payment of all damages, and Mr. Cole went to law for his damages. But the court held he could recover nothing against the State or its grantee, the town of Eastham; that the ancient rights of the State were superior to those of Mr. Cole. And so it is the decided law that a State can give a fishery to a town, which need pay nothing to the common-law owner of the fishery; whereas under some of the water-works acts the public has been made to pay for its water to the miller. Shall this absurd discrepancy longer exist?

In declaring what principles of the ancient common law obtain or do not obtain in this Commonwealth (*e.g.*, in West Roxbury *v.* Stoddard[2] and many other decisions upon different topics), the

[1] Cole *v.* Eastman, 133 Mass. 65.

[2] 7 Allen, 158.

highest tribunal of the State voices the unwritten practices, transactions, and views of her people for ages. It declares practical constructions that have become inveterate. It sees in the ordinance of 1641 the coloring that centuries have given it, and things that the closest student of its phraseology might not discern; and they may well hold that colonial wisdom left no footing in this Commonwealth for any such doctrine as alleged; that reasons of loftier utility control here which were dominant and supreme long prior to the Constitution itself.

It may be, therefore, that the query as to the limit of the riparian's title by English common law never will arise as an isolated question here. A moot point, a fancy conundrum, received not much attention from our court. It must come to its bar in connection with our ways, methods, and circumstances of all these years.

Nor can we expect if the Fall River case reaches Washington, that this debate concerning the metes and bounds of a "species of land" will be continued there. It is not a Federal question.

Thos. M. Stetson.

NEW BEDFORD, MASS.